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20	UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA	
21	ANIBAL RODRIGUEZ, SAL CATALDO,	Case No.: 3:20-cv-4688-RS
22	JULIAN SANTIAGO, and SUSAN LYNN HARVEY, individually and on behalf of all other	PLAINTIFFS' MOTION IN LIMINE
23	similarly situated,	NUMBER 9TO EXCLUDE ANY REFERENCE TO THE UNTIMELY
24	Plaintiffs,	DISCLOSED "PRIVACY AND TERMS" DOCUMENT
25	V.	Judge: Hon. Richard Seeborg
26	GOOGLE LLC,	Trial Date: August 18, 2025
27	Defendant.	
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I. Introduction

Earlier today at 10am Pacific time, Google disclosed opening demonstratives that prominently display and quote a "Privacy and Terms" document that is **not** on Google's exhibit list; was **not** produced by Google during discovery; and was **not** identified by Google in response to an interrogatory asking Google to identify all "PUBLIC DISCLOSURES" that had anything to do with app activity data.

Plaintiffs promptly objected to Google showing this document to the jury during opening. The parties met and conferred at 2pm. Three hours later, at 5pm, Google sent Plaintiffs a new version of the opening demonstratives. The new version now displays excerpts of a *different* version of the "Privacy and Terms" document, which excerpts Google has unearthed from within a 273-page *Australian* court filing from 2020, and which contain different wording from Google's earlier draft of the opening demonstrative.

After showing the jury the 2020 Australian court filing during its opening presentation, Google next intends to show the jury a *July 2025* version of the "Privacy and Terms" document in a so-called "demonstrative" video. Google intends to play that video for the jury during its examination of the first scheduled witness, David Monsees. That so-called "demonstrative" is highly improper for even more reasons: the July 2025 version of the "Privacy and Terms" document was never produced by Google in any format during discovery.

Differences between these two versions of the "Privacy and Terms" document further underscore just how improper this last-minute gamesmanship is. The July 2025 video (and the earlier, now-withdrawn versions of the opening slides) contain *different language* in the parts of the document on which Google wants the jury to focus. Google is attempting to cobble together an evidentiary showing without having timely alerted Plaintiffs to this "public disclosure" and without having produced a full and authoritative set of the various versions of this document that Google has used over the years.

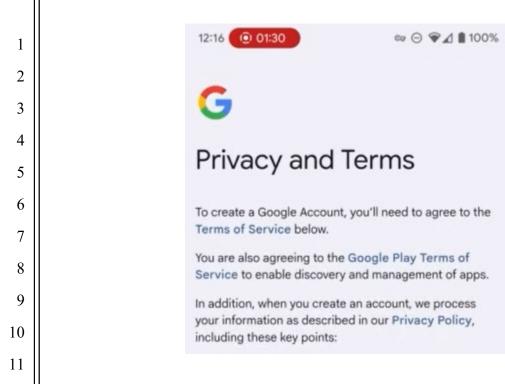
Google's last-minute change to its opening slides resolves precisely none of the problems with allowing the "Privacy and Terms" document to play any role whatsoever in this trial. The bottom line is that Google failed to identify *any* version of this document in response to Plaintiffs'

interrogatory that demanded precisely this information. Plaintiffs conducted discovery, and have prepared their case for trial, based on Google's interrogatory response. The prejudice to Plaintiffs, if Google were now permitted at the very last minute to rely on the "Privacy and Terms" document, would be enormous. Google has not offered any justification (let alone the "substantial justification" required by Rule 37(c)) for its failure to identify this document earlier as a relevant "PUBLIC DISCLOSURE."

The only appropriate remedy for Google's untimely disclosure of the "Privacy and Terms" document is for this Court to prohibit Google: (1) from making any mention or display of the document during opening; (2) from introducing the document into evidence, including through the so-called video "demonstrative"; and (3) from eliciting any testimony about this document.

II. The "Privacy and Terms" Document

The "Privacy and Terms" document is a webpage or mobile screen that purports to be displayed to a user when the user creates a *new* Google Account for the first time. The so-called demonstrative "video" that Google intends to play during Monsees' testimony shows a user's mobile phone screen during the process of creating a new Google Account (at least as of July 2025, which is when the video was created). After the user inputs some basic information—name, date of birth, desired email address, and so forth—the user's phone screen then displays the "Privacy and Terms" document. It is a long document. The "demonstrative" video scrolls through it all. The beginning of the document is shown in Exhibit 1 to this motion (a screenshot of the video at 1:05):



Ex. 1, at 1. The "Privacy and Terms" document contains several passages describing how Google "processes" the user's data and "associates" it with the user's "Google Account." *Id.* The document also states that Google will "process" the user's data "when you use apps . . . that use Google services like ads [and] Analytics." *Id.* at 2. That is (some of) the app-activity data that is at the very heart of this case.

Google's proposed opening slides display two excerpts from a 273-page "Annexure to Statement of Agreed Facts" filed with the Federal Court of Australia in 2020, in a case brought against Google by the Australian Competition and Consumer Commission. The full version of the Australian court filing is G-921, and is attached to this motion as Exhibit 2. This Australian filing purports to contain two (Australian?) versions of the "Privacy and Terms" policy—one dating from "1 January 2017 to 29 April 2018" and the other from "30 April 2018 to 29 October 2019." Ex. 2, at -769 ("Index"). The right-hand margins of nearly every one of the 273 pages are full of out-of-court assertions purporting to explain additional changes to the text that occurred at various times. In some places, the document asserts that it is displaying a "recreation" of the "Privacy and Terms" document. *E.g.*, *id.* at 60. The document's "author," according to its metadata, is an Australian law firm. Frawley Decl. ¶ 2. From the first page to the last, Exhibit G-591 is chock-full

of out-of-court assertions by Google's Australian lawyers about what text supposedly appeared where and when in the "Privacy and Terms" document and other user-facing Google disclosures.

Google's opening demonstratives contain snippets from pages 57 and 59 of the Australian court filing. *Id.* at 57, 59. Google's first slide referencing this document is:

Creating a Google Account

Privacy and Terms

Google

Privacy and Terms

To create a Google Account, you'll need to agree to the Terms of Service below.

In addition, when you create an account, we process your information as described in our Privacy Policy, including these key points:

Data that we process when you use Google

- When you set up a Google account, we store information you give us like your name, email address and telephone number.
- When you use Google services to do things such as write a message in Gmail or comment on a YouTube video, we store the information that you create.
- When you search for a restaurant on Google Maps or watch a video on YouTube, for example, we process information about that activity – including information such as the video that you watched, device IDs, IP addresses, cookle data and location.
- We also process the kind of information described

Google Account



Privacy and Terms

To create a Google Account, you'll need to agree to the Terms of Service below.

In addition, when you create an account, we process your information as described in our Privacy Policy, including these key points:

Ex. 3 at 1.

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The next slide in Google's demonstratives is another excerpt, this one taken from page 59 of the Australian court filing:

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Users Decide What Activity is Saved in Google Account

Privacy and Terms

apps that partner with Google

- Improve security by protecting against fraud and abuse; and
- Conduct analytics and measurement to understand how our services are used. We also have partners that measure how our services are used. Learn more about these specific advertising and measurement partners

Combining data

We also combine this data among our services and across your devices for these purposes. For example, depending on your account settings, we show you ads based on information about your interests, which we can derive from your use of Search and YouTube; and we use data from trillions of search queries to build spell-correction models that we use across all of our

You're in control

Depending on your account settings, some of this data may be associated with your Google Account and we treat this data as personal information. You can control how we collect and use this data now by clicking 'More Options' below. You can always adjust your controls later or withdraw your consent for the future by visiting My Account (myaccount.google.com).

Google Account



You're in control

Depending on your account settings, some of this data may be associated with your Google Account and we treat this data as personal information. You can control how we collect and use this data now by clicking 'More Options' below. You can always adjust your controls later or withdraw your consent for the future by visiting My Account (myaccount.google.com).

The language on that slide is *different from* Google's first version of the proposed opening demonstrative, and also different from the July 2025 version that Google intends to show the jury in the so-called "demonstrative" video. The July 2025 version and the 2020 Australian version are set forth below:

July 2025 Video:

You're in control

Depending on your account settings, some of this data may be associated with your Google Account. Google treats this data as personal information.

Web & App Activity is turned on when you create your account, but you can change this and other settings by selecting "More options" below. You can always change your settings later by visiting account.google.com.

2020 Australian Court Filing:

You're in control

Depending on your account settings, some of this data may be associated with your Google Account and we treat this data as personal information. You can control how we collect and use this data now by clicking 'More Options' below. You can always adjust your controls later or withdraw your consent for the future by visiting My Account (myaccount.google.com).

Ex. 1 at 3; Ex. 2 at -826

Google has not even attempted to explain the difference.

III.

Google Did Not Disclose the "Privacy and Terms" Document In Response to Plaintiffs' Interrogatory Number 8

More than four years ago, Plaintiffs served Interrogatory Number 8, which asked Google to "identify":

one copy of each version of each and every PUBLIC DISCLOSURE that YOU made to USERS. If a PUBLIC DISCLOSURE existed in different versions, IDENTIFY each version separately. For each PUBLIC DISCLOSURE YOU IDENTIFY, state the following information:

- (1) the date range during which the PUBLIC DISCLOSURE was shown by YOU to USERS;
- (2) a brief description of the way in which the PUBLIC DISCLOSURE was displayed to USERS, sufficient to indicate the specific manner in which the PUBLIC DISCLOSURE was displayed.

Ex. 4, at 7. The capitalized term "PUBLIC DISCLOSURE" was defined by Plaintiffs' interrogatory as "any text that was both (1) shown to a USER at any time and in any fashion, including but not limited to a privacy policy or terms of service; and (2) concerns the collection, use, or retention of APP-INTERACTION DATA by any person or entity (e.g., the APP or GOOGLE)." The term "USER" was defined to include "persons residing in the United States who use any of YOUR services." Ex. 4, at 4.

Google responded to this interrogatory by listing, across 16 pages, many versions of various disclosures such as the Privacy Policy; the "How Google Uses Information from Sites or Apps that Use Our Services" webpage, Google's "help pages concerning the Firebase SDK," and others with which this Court is now familiar because the parties have been quoting and discussing them for years. Ex. 5, at 34-49 (Google's third supplemental response to interrogatory 8). *The* "*Privacy and Terms" document was not disclosed in response to interrogatory number 8.* Nor did Google rely on this document in its motions to dismiss, class certification opposition, or summary judgment motion.

The "Privacy and Terms" document should have been disclosed in response to interrogatory number 8. Google obviously believes that the document is a 'PUBLIC DISCLOSURE,' that is, a text purportedly shown to United States users concerning the "collection, use, or retention of APP-INTERACTION DATA." Ex. 4, at 3 (defining "PUBLIC"

DISCLOSURE"). And Google clearly intends to make prominent use of this document during trial, as demonstrated by its inclusion in Google's opening demonstratives.

On today's meet and confer, Google offered no explanation whatsoever for its failure to identify the "Privacy and Terms" document in response to interrogatory 8.

IV. This Court Should Bar Google from Entering the "Privacy and Terms" Document Into Evidence or Eliciting Any Testimony About It

Rule 37(c)(1) is an "automatic sanction" that "prohibits the use of improperly disclosed evidence." *Merchant v. Corizon Health, Inc.*, 993 F.3d 733, 740 (9th Cir. 2021). The rule provides: "if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1).

Rule 26(e) in turn requires that any party "who has responded to an interrogatory . . . must supplement or correct its disclosure or response" in a timely manner "if the party learns that in some material respect the disclosure or response is incomplete or incorrect and if the additional or corrective information has not otherwise been made known." Fed. R. Civ. Proc. 26(e)(l)(A).

"Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information" that was not properly disclosed. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Google bears the burden to prove substantial justification or harmlessness. *Id.* at 1107. Google can prove neither.

Google has no justification for failing to timely supplement Interrogatory No. 8 to identify the Privacy & Terms document. Google served *three* supplemental responses to this interrogatory, including most recently on April 28, 2023. Google identified many other disclosures in its responses and has no excuse for omitting this one, particularly since this one is apparently so critical to Google's defense that it plans to feature it within its opening statement.

Nor can Google prove harmlessness. The prejudice to Plaintiffs from Google disclosing a new "PUBLIC DISCLOSURE" for the first time literally on the eve of trial would be cataclysmic. Plaintiffs are prepared for trial. But their preparation has not focused on this document.

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"The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush." *Rodriguez v. Akima Infrastructure Servs., LLC*, 2019 WL 5212968, at *4 (N.D. Cal. Oct. 16, 2019). "Disclosing the potential use of a document—and the possibility that it may support a claim or defense—allows other parties to meaningfully conduct discovery regarding those materials and what their authors would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context." *Id.* By failing to disclose the Privacy & Terms document, Google has deprived Plaintiffs of the opportunity to pursue discovery into this document and plan for trial. *See id.*

One consequence of Google's failure to identify the "Privacy and Terms" document has become apparent just in the last few hours—the lack of an authoritative set of the various versions of this document shown over time. For every "PUBLIC DISCLOSURE" that Google did identify, in response to interrogatory 8, Google agreed to provide (at Plaintiffs' insistence) separate productions of each version of the document in use in the United States and the date on which it first came into use. Nothing of the sort exists for the "Privacy and Terms" document—instead, Google asks to be permitted to introduce its Australian lawyers' say-so about what the document said during just two time periods. Furthermore, if this document had been timely identified during discovery as a relevant "PUBLIC DISCLOSURE," then Plaintiffs would have demanded earlier versions of it from *before* the class period began. After all, this is a document shown to the user just once, during the process of creating a new Google account. Some class members created their accounts *before* the class period began and thus may have seen an earlier version of this document—or something else entirely. Google's untimely disclosure deprived Plaintiffs of an opportunity to take discovery into that and any other issues regarding this document.

The proper sanction for Google's egregiously untimely disclosure of the "Privacy and Terms" document is for this Court to enter an order that: (1) forbids Google from even showing the document to the jury (whether during opening statements, or in the supposed "demonstrative" video, or in any other way); and (2) forbids Google from eliciting any testimony about the

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document's contents. *See Rodriguez*, 2019 WL 5212968, at *4 (entering similar order because of party's failure to timely produce information during discovery).

V. Google's Exhibits G-574 and G-921 Are Inadmissible Hearsay

Even if the Court does not exclude the "Privacy & Terms" document from trial altogether under Rule 37(c), the Court should still bar Google from using its proposed demonstrative slides for another, independent reason: The Australian court filing is inadmissible hearsay as to which no exception applies. Because the document will not come into evidence at trial, Google should not be allowed to show excerpts of it to the jury during Google's opening statement.

To be sure, the text of the actual "Privacy & Terms" document is not hearsay—for the same reason that a contract is not hearsay. The actual "Privacy & Terms" would not be offered to prove the truth of anything.

But the 2020 Australian court filing *is* hearsay. This document is an out-of-court statement that is being offered to prove: (1) what text appeared on the "Privacy and Terms" computer screen or mobile app; (2) at what point in the process of creating an account that text appeared; and (3) the dates during which the text appeared. The margins of the document contain numerous out-of-court assertions, apparently by Google's lawyers, purporting to attest to what parts of these public disclosures were shown to users and when. In some places the document states that it is displaying "recreation[s]" of what the document said. *E.g.*, Ex. 2, at -827. To prove what the "Privacy and Terms" computer screen or mobile screen actually stated to United States users, and when, Google may not now rely on five-year-old, out-of-court assertions by its Australian lawyers.

VI. Conclusion

If Google wanted to use the "Privacy and Terms" document to support its defenses, then Google was required to identify the document in response to Interrogatory 8. Google's failure to do so caused Plaintiffs not to seek discovery on the document. With less than a day before trial begins, the prejudice to Plaintiffs from permitting the document into evidence would be catastrophic. Exclusion of the document entirely, as well as any testimony relating to it, is the "automatic sanction" that Rule 37(c)(1) requires. *Corizon Health*, 993 F.3d at 740.

1	Dated: August 17, 2025	Respectfully submitted,
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